BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM A. BURNETT Claimant	)	
VS.	)	Docket No. 1,058,102
HI TECH INTERIORS, INC. Respondent	)	
AND	)	
CINCINNATI CASUALTY COMPANY Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the December 14, 2011, preliminary hearing Order for Compensation entered by Administrative Law Judge (ALJ) Brad E. Avery. John M. Ostrowski of Topeka, Kansas, appeared for claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 13, 2011, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Did claimant suffer a personal injury by accident arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant worked for respondent from 1994 until he voluntarily quit in May 2002. In November 2004, claimant was rehired by respondent as a foreman. Respondent does interior commercial construction, including both new construction and remodeling. Respondent was having a sale, and around 2:00 p.m. on September 29, 2011, claimant was directed by superintendent and general contractor Dave Woodruff to move materials in order to get ready for the sale. Claimant ". . . stepped over a pile of material, stepped onto a four-by-four that was underneath the material, or dunnage, and twisted and -- didn't fall clear down, just kind of went down."[1] Claimant testified that he hurt above his left kneecap and on the inside of his left knee.

Claimant previously had arthroscopic knee surgery in 1990, but indicated he had no further problems with the knee until September 29, 2011, other than aches. He was able to perform his job tasks prior to September 29, 2011, and had never missed work because of the left knee. He never sought treatment for his knees from his primary care physician between 1990 and 2011.

Claimant worked Monday through Thursday each week, and September 29, 2011, was a Thursday. Following the incident when claimant twisted his knee, he worked the rest of the day. When claimant clocked out, he signed his time sheet which stated, "I hereby certify that these hours are true, correct & that I have received no injuries during this pay period."[2] Claimant testified that at the time he signed the time sheet, "I didn't think -- I didn't think I had an injury. I just figured it was another deal where you twisted and turned and it would feel better later."[3]

Claimant testified that over the weekend following September 29, 2011, his left knee became sore and it swelled. He stayed off of the left knee, elevated it and took Tylenol. On Monday, October 3, 2011, claimant returned to work. On October 3, 2011, claimant met with Casey Willich, the project manager and office manager of respondent's Lawrence, Kansas, office. Mr. Willich noticed claimant was limping and wanted to know what claimant had done. Claimant replied that he did not know what he had done to his knee. Claimant testified that he meant he did not know medically what he had done to his knee. Each day, the knee became more painful and on October 5, 2011, claimant reported the accident to Tracy, who works in the office of respondent. Tracy arranged for claimant to see a doctor at PromptCare the same day.

Claimant saw Dr. Michael J. Geist at PromptCare and he ordered an MRI of the left knee. The MRI revealed a partial tear of the quadriceps tendon complex at its attachment at the superior anterior patella. The MRI also revealed some chronic conditions including

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[1] P.H. Trans. at 6.

[2] *Id.*, Ex. 4.

[3] *Id.*, at 10.

chondromalacia patella and osteoarthritis and joint space narrowing in the medial compartment. After reviewing the MRI, Dr. Geist diagnosed claimant with a partial tear of the quadriceps tendon of the left knee, which was the result of an acute injury and not a chronic condition. He gave claimant temporary restrictions and prescribed a brace to immobilize claimant's knee. At a follow-up visit to the clinic on October 6, 2011, claimant was given temporary restrictions of no standing, walking or driving and to use the knee brace at all times. Additionally, an orthopedic consultation was to be scheduled. The October 5 and 6, 2011, visits at PromptCare comprise the only medical treatment claimant received for his left knee.

Martin Baumgard, a field superintendent for respondent, testified that he is claimant's supervisor. Claimant did not report the accident to him on September 29 or October 3, 2011. On October 4, 2011, Mr. Baumgard saw claimant and noticed that he was limping again and asked claimant what was wrong. Mr. Baumgard testified that on previous occasions he had observed claimant limp. Claimant indicated that his knee was hurting and his wife thought it was gout. Mr. Baumgard testified he was told by claimant that it was an old injury. Mr. Baumgard testified that four or five years earlier, claimant decided not to use stilts because he did not want to ". . . mess up his knees any more."[4]

The ALJ issued a preliminary hearing Order for Compensation finding claimant suffered an accidental injury arising out of and in the course of his employment with respondent and that claimant was a credible witness. He also granted claimant temporary total disability benefits at the rate of $555.00 per week commencing October 7, 2011, until further order; or until certified as having reached maximum medical improvement; or until returned to gainful employment, whichever occurs first.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Workers Compensation Act. L. 2011, Ch. 55, Sec. 1 provides in relevant part:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur

[4] P.H. Trans. at 32.

> during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . . .
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
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> . . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[6]

ANALYSIS AND CONCLUSION

This Board Member finds claimant met his burden of proof that he suffered a left knee injury by accident arising out of and in the course of his employment with respondent. Respondent asserts claimant did not injure himself at work, but offers no alternative explanation for claimant's partial tear of the left quadriceps tendon. Respondent's main arguments are (1) claimant signed a time sheet, which indicated he did not suffer an injury

[5] K.S.A. 44-534a.

[6] K.S.A. 2010 Supp. 44-555c(k).

at work and (2) he did not report the left knee injury until the third working day following the accident. These arguments are not persuasive.

Dr. Geist's records indicated claimant sustained a partial tear of the left quadriceps tendon that resulted from an acute injury. Claimant had related the incident of September 29, 2011, to Dr. Geist. Claimant testified that from 1990 until September 29, 2011, he had never missed work due to knee pain and only had some aching in the knee. The medical evidence in the record supports the ALJ's finding that claimant met with personal injury arising out of and in the course of his employment with respondent.

Initially claimant was uncertain whether his injury was serious. When claimant signed his time sheet, he thought he merely twisted his left knee and it would get better. He reported his injury within the statutory time period. Claimant's credibility is not tarnished by the fact that he reported his injuries a few days after the accident.

As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,[7] appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful."[8]

Here, the ALJ had the opportunity to assess claimant's testimony. The Board generally gives some deference to an ALJ's findings and conclusions concerning credibility where the ALJ personally observed the testimony. Based upon the evidence presented, the ALJ concluded claimant presented sufficient evidence to prove he sustained a left knee injury arising out of and in the course of his employment with respondent. This Board Member concurs and affirms the ALJ's Order.

WHEREFORE, the undersigned Board Member affirms the December 14, 2011, preliminary hearing Order for Compensation entered by ALJ Avery.

IT IS SO ORDERED.

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[7] *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

[8] *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

Dated this ____ day of February, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge